

REVIEW ESSAY

Russell A. Miller and Rebecca M. Bratspies (eds.), *Progress in International Law*, foreword by José E. Alvarez, *Developments in International Law* 60, Leiden: Martinus Nijhoff Publishers, 2008, ISBN 9789004165717, 911 pp., €237.00 (hb)

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Progress in International Law, edited by Russ Miller and Rebecca Bratspies, is one of the most notable compiled volumes in the field of general international law for 2008. It merits the reader's attention for several reasons. First, it deals with a central mantra of internationalism, namely the Kantian idea that international law can be a catalyst for social progress on a global level. While progress is regularly used in international law writings as a slogan to accentuate diverse claims of renewalism, it is a notion that has received as such little attention in scholarship. In this sense, the book at hand responds to an important gap in the literature. Second, the editors have clearly devoted a lot of attention in the planning and production of the book to ensuring that the essays are meaningfully juxtaposed, complementary, and in dialogue with one another. Although this is an essential quality for any compiled volume, it is easier said than done, and this book has done reasonably well. The final product boasts some forty contributors and more than 900 pages of text, packed together in an attractive (but steeply priced) hardback edition by Martinus Nijhoff (Brill). Third, the book aspires to 'survey the state of the contemporary legal order' (p. 11). This is a broad and unusually ambitious scholarly project aimed at 'cataloguing this generation's tangled international legal order' and hoping 'to map the current tendencies, theories, doctrine, and trends' (p. 11). This last promise alone would have been sufficient to trigger anyone's interest in the book at the beginning of (what is perceived to be) a new era of internationalism.

Without a doubt, the most intellectually intriguing aspect of the book is the manner in which editors and contributors decide to chart the relationship between international law and progress. Now, the assertion that international law is somehow part of progressive politics, or the claim that international law, like a science, progresses in time, may appear intuitive to most ears. The relationship between international law and progress, however, is far from self-evident. For example, does international law really contribute to social progress? What does progress mean in this context? Does the term 'progress' have precise content? Is this content objectively or subjectively determined? Could it be that one person's progress is another's regression? If that is the case, how does one choose the 'right' definition of progress? And so on.

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Such questions are not posed in a vacuum – they rarely are. The editors acknowledge in their editorial note ('Progress in International Law – An Explanation of the Project', pp. 9–29) that, at the beginning of the new century, international law finds itself yet again in a state of 'flux' and uncertainty (p. 9). This condition is brought about by 'three epochal developments' which are no other than the end of the Cold War, the rise of the 'era of global terrorism', and the 'rapid pace of technological change' (p. 9). These new conditions, according to the editors, have 'eroded' the universal nature of foundational assumptions in international law. Setting aside this factual–political context, references by the editors to the writings of Martti Koskenniemi, David Kennedy, and even Jacques Derrida betray between the lines yet another development that shapes the historical conjuncture in which the book is written. Postmodern critique of the grand narratives of the Enlightenment, such as that of human progress, has irreversibly entered on to the international law argument stage. With the advent of such critique, the editors find it hard to speak meaningfully about progress without at least reckoning with the complex relationship between history, ideology, truth, and narrativity.

The book itself appears to have been inspired by a remarkable, if relatively underappreciated, monograph published in 1932 by Manley O. Hudson, the doyen of US international law scholars of the inter-war period.¹ The title that Miller and Bratspies have chosen for their book, *Progress in International Law*, is a paraphrase of the title of Hudson's initial monograph ('Progress in International Organization'). This choice underscores the intricate relationship between the two projects. In so many words, the aspiration of the book is not to define head-on the notion of progress in the context of international law but, rather, to record the state of affairs at the beginning of the new century, much as Hudson did at the beginning of the tumultuous decade of the 1930s. The project is about putting on record views by academics and practitioners involved in everyday international law about 'how things stand' at the moment of writing. Thus the editors hope to create an artefact, a snapshot of our times, for the benefit of present and future generations. The ulterior motive, similar to Hudson's, is to accumulate data for an informed assessment of whether international law is able to meet its goals. Consequently, the objective is to answer the question of whether international law has achieved internal disciplinary progress or whether it has contributed to wider social progress at the moment of writing.

A footnote is due here. Any effort to record reality 'as it is', as this book aims to do, stumbles on an inescapable roadblock. As historian Hayden White writes,

[T]he capacity to envision a set of events as belonging to the same order of meaning requires some principle by which to translate difference into similarity. In other words, it requires a subject common to all of the referents of the various sentences that register events as having occurred.²

1 M. O. Hudson, *Progress in International Organization* (1932).

2 H. White, 'Narrativity in the Representation of Reality', in White, *The Content of the Form: Narrative Discourse and Historical Representation* (1987), 1, at 16.

No compendium of historical records can be compiled without an external point of view that offers itself as a filter, which helps to distinguish events worth being recorded from others that are not. In addition, and following White's work, the odour of truth, reality, or objectivity in narrative is mostly generated by the absence of all references to a narrator. Events are recorded 'as they appear' and they seem to present themselves to the reader without mediation. Consequently, the filter by which the author has chosen to select certain events but not others is removed from sight or denied altogether. Reality acquires a plot, a structure of relationships that makes events meaningful and runs from the beginning to the end. The story recounted is complete, linear, and without gaps. International law is found to have progressed or regressed, depending on the data collected.

Does, however, international law present itself to observation in the form of such complete and coherent stories of progress/stagnation/declension, with proper beginnings, middles, ends, and causalities? Or does international law present itself rather in the form of a sequence of facts without concrete beginnings or ends, or even as a series of beginnings and ends that could be read in a number of different ways depending on the agent of observation? Is there something that is left out, that is excluded, when we collect data about how things stand at the moment of writing? How aware are we of the filter that we use or of the exclusions of our filter? Are we even aware of the fact that our 'historical' work may be more ideological than technical? As White would ask,

[I]s the fiction of such a world, capable of speaking itself and of displaying itself as a form of a story, necessary for the establishment of that moral authority without which the notion of a specifically social reality would be unthinkable?³

Statements about how things are, aside from legitimate expressions of subjective convictions or aspirations, may prove to be powerful ideological rhetorical strategies of legitimation or delegitimation.

The view of narrativity attributed to Hayden White, above, has become mainstreamed in its generic version in most social sciences for three decades already. Such concerns have been introduced in international law only at the end of the 1980s, with the path-breaking works of David Kennedy,⁴ Martti Koskenniemi,⁵ and many others. Although it may be too early fully to evaluate the impact of the 'new approaches to international law' on the discipline, most people would agree that the movement has provoked at least one profound change of attitude in the scholarly community. In the advent of critical work, traditional faith in the 'truth' or 'objectivity' of the founding narratives of the discipline has given way, at least in most quarters, to a much more nuanced relationship that acknowledges the possibility of more than one history. José Alvarez, former president of the American Society of

3 Ibid., at 24–5.

4 Examples of Kennedy's early works are 'Spring Break', (1985) 63 *Texas Law Review* 1377; *International Legal Structures* (1987); 'A New Stream of International Legal Scholarship', (1988) 7 *Wisconsin International Law Journal* 1.

5 See M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989), ranked among the most influential international law books of the twentieth century.

International Law, flags this new loss of faith in his foreword to *Progress in International Law*:

We are no longer sure what ‘progress’ in international law entails. We are no longer as sure, as were many in Hudson’s day, whether we need or want *more* international law and institutions. We are no longer certain that ‘international’ means supranational in terms of effect . . . We are no longer of one mind about when we ought to seek global harmonious rules over more contextually sensitive regulation, even at the expense of ‘fragmentation’. We are sometimes confused about who ought to participate in international law making processes. (p. 7, emphasis in original)

Hence the first question to be asked in reviewing *Progress in International Law* is: what precisely is the editors’ own understanding of how the notion of progress squares with international law? How does the book aspire to catalogue international law in its current state, while acknowledging postmodern critique? The editors express their hope that explorations of the intricate relationship between progress and international law will at least ‘color’ their book (p. 11). Their answer, however, really comes in the language of editorial pragmatism. They make it clear that the book ‘does not directly confront the indeterminacy at the heart of the progress narrative’ (p. 24). Instead, questions of progress ‘operate mostly as a backdrop to this book’ and this is ‘in part, a result of conscious editorial choice’ (p. 24) – that is, they did not wish to ‘narrow the contributors’ gaze’ on the materials (p. 24). Although the answer provided is clear, it is not entirely persuasive, especially since the decision of the editors ‘was not intended to diminish the fundamental critique that progress narratives are inherently slippery and value laden’ (p. 24).

Choosing not to address critiques of narratives of progress in a book called *Progress in International Law* is not without consequences. To begin with, editors and authors pass up a great opportunity to engage the centrepiece of modern social sciences, namely the idea that there ‘is’ such a thing as social progress and – an international lawyer’s version of the story – that international law is a crucial agent for its materialization. In addition, in its quest for firm ground that brackets the postmodern critique, the book resorts to Hudson’s own ‘modernist-positivist’ (as the editors brand it) epistemology as an inspiration for the articulation of its research questions. Perhaps the most crucial concession, part and parcel of the same ‘modernist’ vision, is that most of the essays in the volume ‘generally proceeded from the unspoken assumption that progress could be measured, debated, and agreed upon’ (p. 24). Authors and editors alike seem to experience Marshall Berman’s modernist anxiety that ‘all that is solid melts into air’,⁶ at the beginning of the new century ‘the accepted grounds of international consensus and cooperation seem to be shifting under our feet’ (p. 25). Hence the book operates on the assumption that the cataloguing of today’s reality for the assessment of the progress achieved is a meaningful exercise which retains its own inherent value in re-creating some sovereign ground for international law: ‘[a]ware that we are succumbing to this particular

6 M. Berman, *All that Is Solid Melts into Air: The Experience of Modernity* (1982).

facet to international law's progress narrative', the book proceeds 'with the belief that an accounting of the state of contemporary international law would prove both challenging and enriching' (p. 25).

Is 'succumbing' to the traditional understanding of progress narratives (and Hudson's 'positivist-modernism') a 'good' or a 'bad' thing? Before this final question is answered, the following paragraphs will give a brief exposé of the book and the essays that it contains.

I. THE ESSAYS

In *Progress in International Law* the 38 or so contributions are spread over seven sections, corresponding to a rather traditional division of labour. Part I is titled 'Progress in International Law – A Contemporary Assessment', closely simulating Hudson's initial project, with two essays that dare an overall assessment of the state of international law today. Subsequent sections of the book address different thematics, roughly corresponding to the nuts and bolts of Hudson's critique of the state of international law in 1932. Part II (five essays) deals with 'History and Theory of International Law'; Part III (four essays) with 'Sources of International Law and Their Application to the United States', especially international treaties and customary law; Part IV (seven essays) with 'International Actors'; Part V (five essays) with 'International Jurisdiction and International Jurisprudence'; Part VI (seven essays) with the 'Use of Force and the World's Peace'. Finally, Part VII (eight essays) departs from Hudson's thematography and introduces a specifically contemporary concern, namely 'The Challenge of Protecting the Environment and Human Rights'. In lieu of an epilogue the book closes with excerpts from Manley Hudson's 1932 essay.

The purpose of this brief presentation of the book's contents is not to give an account of the wealth of views expressed by the different authors but rather to point to the way in which the relationship between international law and progress is drawn in some of the texts. From this narrow point of view, most essays apply themselves rather uniformly to the editorial project of cataloguing recent developments and measuring the extent to which they have contributed to progress. There are two exceptions to this rule and they are discussed below.

In the opening essay ('Evidence and Promise of Progress: Increased Interdependence, Rights and Responsibilities, Areas of Interaction, and the Need for More Cooperative Armed Force', pp. 33–50), Jordan Paust draws parallels between the inter-war period and today. He concludes that certain developments since the inter-war period, such as increased human interdependence, the increased recognition of private and public individual roles, and the growth of international and regional institutions, have all brought the gradual effectuation of certain human values. These values include human dignity, tolerance, human rights, democratic values, and the cooperative use of armed force. For Paust, the gradual effectuation of these values provides 'both an evidence and promise of progress in international organization' (p. 50). The point here is not to question whether Professor Paust is right or wrong but rather to observe the relationship between law and progress in the text. The

author's notion of progress is not defined as such, whereas attainment of the said values offers evidence and promise of its materialization. The precise relationship between values and forward movement is not explained but taken as self-evident, in the commonsense way of who would doubt that 'more human dignity' is a 'good thing'? Although the answer would indeed appear self-evident to most, one can legitimately ask what 'more human dignity' really means, whether the listed achievements do lead to more human dignity on the global level, what the costs or exclusions of recent developments are, and so on. Now, despite the absence of such ruminations, Professor Paust's argument does not alienate the reader. The reason is precisely that the argument operates self-referentially against the background of a liberal-democratic narrative of progress, which is never spelled out but assumed as true throughout the text. This narrative celebrates the said values as yardsticks of progressive internationalism over the past hundred years. The liberal-democratic narrative, however, is not questioned. Its various failures, critiques, or bias are not part of the account. As a consequence, the essay concludes that during the last hundred or so years progress has been achieved.

Barry Carter ('Making Progress in International Institutions and the Law', pp. 51–68) calls on the United States to 'contribute to progress' in international law by adopting a more sophisticated approach to internationalism. According to Carter, an enlightened invocation of self-interest, gradual and incremental commitment to multilateralism, strategic use of externalities (leveraging), and strengthening the domestic rule of law would be some of the measures that would help the United States 'to participate in a major and constructive way in making progress in international institutions and international law' (p. 68). Again, regardless of whether one agrees or not with Professor Carter's advice, the kind of progress to which the United States should contribute is not defined as such. It is postulated as synonymous with a style of multilateralism that manages to strike a fine balance between sovereign and community interests, and this is treated as a rather self-evident definition of progress in internationalism. Sergio Delavalle ('The Necessity of International Law against the A-normativity of Neo-conservative Thought', pp. 71–93) defends international law in the face of 'neo-conservative' critique, as a necessary institution that continues to perform, under certain conditions, progressive functions (p. 117). Christian Walter ('Progress in International Organization: A Constitutionalist Reading', pp. 133–50) takes on Hudson's ideas about international organization and relates them to current ideas about the so-called constitutionalization of international law. For Professor Walter, constitutionalization may be contrasted with hegemony and unilateralism, the first being associated with progress but the last two with a less preferable model of organization. Again, the exact relationship between constitutionalization and progress is not spelled out but is assumed as evident, probably by reference to some background narrative about the relative success of constitutionalism in opposition to other models of governance. Leila Sadat ('Individual Progress in International Law: Considering Amnesty', pp. 335–56) sees a strong element of progress in the paradigm shift from the state-centred model that prevailed in Hudson's era to the contemporary one that provides for international criminal responsibility for individuals when their actions affect a fundamental interest of *l'ordre public international*.

In particular, she welcomes the newly crystallizing view that even individuals who have been granted state-sanctioned amnesty for violations of *jus cogens* crimes should not be immune from the jurisdiction of international courts. Mary Bedikian ('The Triumph of Progress: The Embrace of International Commercial Arbitration', pp. 517–38) sees a 'triumph' in the exponential growth of possibilities for arbitration of disputes during recent decades. Cesare Romano ('Progress in International Adjudication: Revisiting Hudson's Assessment of the Future of International Courts', pp. 433–49) sees progress in the phenomenon of the proliferation of international courts and tribunals, as 'the beginning of a process leading to the construction of a coherent international order based on justice' (p. 449).

In less celebratory tone, Ed Morgan ('Yom Kippur in Hell: The Empty Life of International Law', pp. 119–31) considers progress as a notion devoid of meaning in the context of international law. Morgan describes claims about progress in international law as 'more akin to markers along the meandering route of an empty vessel' (p. 120). By reviewing UN Security Council resolutions during the 1973 Middle East crisis, Morgan explains how, at least in that instance, international law's doctrines are 'empty' of substantive content, like an empty prayer (p. 121), in the sense that the promises made in the text do not hold against the facts. For Morgan, international law is 'a story woven together with nothing than [*sic*] loose ends' and, as a consequence, 'it is a form of discourse whose competing parts are more prominent than its narrative whole, or more accurately, its narrative hole' (p. 128). To cover this paucity of content, the argument continues, legal texts resort to doctrinal complexity (p. 131). Doctrinal complexity tries to fill the vacuum with standards, norms, criteria, conditions, and processes that need to be satisfied for progress to occur. At the same time, Morgan contends, it is well understood (much like an empty prayer) that international law will not fulfil its promise. Morgan's critique, however, is not against the possibility of progress but against international law's claim that it has achieved it. The story is one of failure instead of success, of disenchantment instead of optimism.

Two essays, offering a little, but valuable, dissent in the overall project, distinguish themselves by adopting a decidedly different approach. Florian Hoffmann's essay ('In Quite a State: The Trials and Tribulations of an Old Concept in New Times', pp. 263–89) performs a genealogy of the various transformations that the notion of the state, as a theoretical concept, has undergone in international law since Hudson's time. Hoffmann, however, refrains from associating any of these transformations with progress in any decisive way. Instead, he sees rich and complex notions of the state that are constructed on the basis of specific epistemic or ideological assumptions and exercise influence over international law discourse with differential outcomes. The contemporary view is not more or less progressive than the preceding one – it simply participates in a different discourse and has a different relative role in that discourse. Alexandra Kemmerer ('The Turning Aside: On International Law and Its History', pp. 71–93) takes a reflective view on the role of history in international law argument. She starts from international law's rejuvenated interest in its own history during the last two decades to make the argument that the use of history and historical narratives of progress is, in itself, a style of international law writing.

International law's histories, far from 'speaking themselves', are techniques with their own limits and potentials.

2. CRITIQUE

Let us then return to our initial question. Is 'succumbing' to the traditional understanding of progress narratives (and Hudson's 'positivist-modernism') a 'good' or a 'bad' thing? Is it part of some progressive or regressive political project? *Progress in International Law*, as expressed at the beginning of this review, is very a notable compilation of essays on account of its attempt to catalogue the state of affairs in international law at the beginning of the twenty-first century, while foregrounding the important relationship between international law and progress. The editors have succeeded in offering a snapshot of the current state of affairs and in creating, as they hoped, an artefact for present and future generations – and have done so in style. At the same time, they pass on a great opportunity to enrich its investigation with a much-needed dialogue with recent critiques of progress narratives. But here comes the question and the moment when the thrust of this review essay can be turned against itself: the expression 'missing an opportunity' acquires meaning only by reference to another progress narrative, superimposed this time by the present reviewer, according to which a critical exploration of the notion of progress would be somehow a 'good' or 'progressive' thing.

Dislodging a notion of progress that 'speaks itself'; revealing the mechanisms within a text, language, or ideology (or all of the above) that produce meaning about progress; the performance of ideology critique or critical analysis of progress narratives; these are not about revealing truth or correctness. These are critiques not directed at proving certain narratives right and others wrong. These are not about demonstrating that any of the authors in the book under review are correct or incorrect in their conclusions about whether development *x* or doctrine *y* is useful or not for international law. The type of critique that is suggested here has quite different aims. First, it points towards the understanding that meaning about progress does not exist in natural form 'in a world out there', but is actually produced by the narratives themselves. Although progress is a convenient rubric for describing international law events, developments, doctrines, actions, or institutions, progress is a notion that is ultimately devoid of meaning unless placed in the context of a progress narrative. In other words, the term 'democracy' acquires its progressive connotation because of a narrative of how things were before, how they stand now, and how they should become. So, the first point of this critique of the book is that it misses an opportunity to point to the discursive production of meaning. Second, the critique hopes to demonstrate that narratives of progress are by definition non-objective. As such, progress narratives compete for hegemony with (or exclude) other progress narratives. At the same time, and this is where we get closer to the critique of *Progress in International Law*, international law tends to deny or mask the non-objective character of its progress narratives. As a consequence, although progress narratives may be a useful (or even unavoidable) discursive form, the demystification of such narratives may be an equally useful form of international law

argument. 'Useful' here refers to the fact that the demonstration of the non-objective character of progress narratives gives access to a different horizon of action and intellectual possibility. To begin with, it opens up the field to the possibility of many alternative histories as opposed to a single History. Acceptance of this possibility creates space for alternative accounts of what happened, unlocking possibilities of formerly excluded constituencies or interests to represent themselves more fully. It also highlights the intricate relationship between legal history, discourse, and ideology, according to which meaning about progress is produced by international law discourse rather than merely represented by it. By steering clear of this dimension of the debate, *Progress in International Law* has taken a stance that helps to confirm, rather than dislodge, historical narratives of progress that claim to be self-evident, true, or ideology-free, or to 'speak themselves' in some way or another. By doing so the book nurtures a range of optimistic (in some cases enthusiastic) progress narratives that see international law in a state that, in a way similar to Hudson, allows room for optimism that may, or may not, be warranted by the facts.

All this can be a good thing or a bad thing depending on where one stands. Hence, in closing, I shall agree with Florian Hoffman, who writes, 'Even though we know that this [Hudson's] optimism was, in the short term, not warranted, it may still be taken to represent a legitimate way to deal with the certainty of the coming of the unknown' (p. 287).